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September 5, 2003
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: March 19, 2003

Case Number: TSO-0025

This Decision concerns the eligibility of XXXXXX (hereinafter referred to as "the individual") to hold an access authorization (also called a security clearance). The local DOE security office determined that information in its possession created substantial doubt about the individual's eligibility for an access authorization under the Department of Energy (DOE) regulations set forth at 10 CFR Part 710, Subpart A, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." As explained below, I have concluded that the individual should not be granted access authorization.

Background

The individual works for a DOE contractor. His employer would like him to work on a project that requires an access authorization. The local DOE security office issued a Notification Letter to the individual on February 10, 2003. The Notification Letter alleges that DOE has substantial doubt about the individual's eligibility for a clearance, based upon disqualifying criteria set forth in section 710.8, paragraphs (f) and (l) (Criteria F and L).

The Notification Letter states that the individual deliberately misrepresented, falsified or omitted significant information from a Personnel Security Interview (called a PSI) conducted in January 2002. According to the Notification Letter, the information the individual omitted in the January PSI concerns (1) the circumstances surrounding his 1995 arrest (in another state) on a charge of indecent exposure for masturbating in a men's room, (2) his prior involvement in sexual encounters in the same restroom where he was arrested, and (3) his history of homosexual encounters before and during his marriage. In the post-test interview following an exculpatory polygraph examination the individual voluntarily underwent in May 2002, and in a second PSI conducted in July 2002, the individual disclosed a significant amount of additional information about his 1995 arrest, a prior sexual encounter in the same restroom, and the extent of his history of

homosexual encounters. The individual's failure to reveal this information in the first PSI is the security concern under Criterion F.

The Notification Letter states under Criterion L that the individual has engaged in unusual conduct or is subject to circumstances which tend to show that he is not honest, reliable, or trustworthy, or which furnishes reason to believe that he may be subject to pressure, coercion, exploitation, or duress, which may cause him to act contrary to the best interests of the national security. These concerns are based on the fact that when the Notification Letter was issued, the individual's wife did not yet know he has had a number of homosexual encounters in the last four years, and the individual's failure to tell the interviewer in the first PSI that he was bisexual because he was embarrassed.

Because of these security concerns, the case was referred for administrative review. The individual filed a request for a hearing on the concerns in the Notification Letter. DOE transmitted the individual's hearing request to the Office of Hearings and Appeals (OHA), and the OHA Director appointed me as Hearing Officer in this case.

At the hearing I convened, the DOE Counsel called two witnesses, a personnel security analyst who had conducted the PSIs with the individual in January and July 2002 and drafted the Statement of Charges for the Notification Letter, and a personnel security specialist who testified about DOE's concerns. The individual represented himself, testified on his own behalf, and called four other witnesses: a long-time personal friend who testified by telephone, his project manager, a fellow employee at the DOE facility who was also a social friend, and his wife. DOE submitted eight written exhibits, and a videotape of the individual's May 2002 exculpatory polygraph examination. DOE only relied on a brief portion of the polygraph videotape, i.e., the post-test interview in which the individual made certain admissions that contradicted his statements during the January 2002 PSI about the circumstances involved in his 1995 arrest. The individual did not submit any written exhibits, but at the hearing, he indicated he would rely on another portion of the polygraph videotape, which he proffered to support his claim that he intended to answer honestly all questions about his 1995 arrest.

Standard of Review

The applicable DOE regulations state that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all the relevant information, favorable or unfavorable, as to whether the granting of access authorization would not endanger the common defense and security and would be clearly consistent with the national interest." 10 CFR § 710.7(a). In resolving questions about the individual's eligibility for access authorization, I must consider the relevant factors and circumstances connected with the individual's conduct, set out in § 710.7(c):

the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, to include knowledgeable participation; the frequency and recency of the conduct; the age and maturity of the individual at the time of the conduct; the voluntariness of participation; the absence or presence of rehabilitation or

reformation and other pertinent behavioral changes; the motivation for the conduct; the potential for pressure, coercion, exploitation, or duress; the likelihood of continuation or recurrence; and other relevant and material factors.

A DOE administrative review proceeding under 10 CFR Part 710 is authorized when the existence of derogatory information leaves unresolved questions about an individual's eligibility for access authorization. A hearing is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 CFR § 710.21(b)(6). Once DOE has presented derogatory information affecting an individual's eligibility for access authorization, the individual must come forward with evidence to convince DOE that restoring his or her access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." *See, e.g., Personnel Security Hearing* (Case No. VSO-0013), 25 DOE ¶ 82,752 at 85,511 (1995), and cases cited therein. The DOE regulations were amended in 2001 to state that any doubt regarding an individual's eligibility for access authorization shall be resolved in favor of the national security. 10 CFR § 710.7(a). For the reasons discussed below, it is my opinion that the individual has not resolved the concerns in the Notification Letter, and should not be granted access authorization.

Findings of Fact

The individual did not dispute the principal facts alleged in the Notification Letter. However, the individual maintained that the local DOE security office misinterpreted those facts, and he attempted to show that he did not deliberately hide any significant information relevant to his eligibility for a clearance from DOE during the first PSI. In addition, the individual attempted to show that since he has now told his wife, his project manager, and close personal friends about the extent of his homosexual activities before and during his marriage, and promised to eschew extramarital encounters in the future, he is no longer vulnerable to blackmail or coercion. This case turns on the credibility and the persuasiveness of the evidence and arguments the individual presented to explain away the discrepancies between what he told DOE during the first and second PSIs, and to show that he is not vulnerable to coercion.

Testimony of the Witnesses at the Hearing

The Personnel Security Analyst

DOE presented the evidence underlying its concerns through the testimony of the personnel security analyst who conducted the two PSIs with the individual and drafted the Notification Letter. The analyst recounted that when questioned about his arrest during the first PSI, the individual denied masturbating as indicated in the police report, and claimed that he had no intention of exposing himself or being involved in a sexual encounter in the men's room where he was arrested. Hearing Transcript (hereinafter cited as "Tr.") at 14; Police Report (DOE Exhibit 5). She testified that near the end of the first PSI, she asked the individual if there was anything else DOE should know about that he thought was "important or relevant." The individual then volunteered that he had been

sexually molested as a child, admitted that he had been involved in homosexual acts less than ten times up to his sophomore year in college, but denied that he had been involved in any other homosexual acts since that age, and denied that he was homosexual. *Tr.* at 15. Since there was a discrepancy between the police report and the information the individual told the interviewer, she asked him to volunteer for a polygraph “in hopes to mitigate this discrepancy.” *Id.* The individual elected to take a polygraph. The polygraph examination took place approximately four months after the first PSI.

At this point in the hearing, the DOE Counsel played DOE Exhibit 9, a videotape showing the last six minutes of a post-test interview with the individual conducted by the polygraph examiner who tested the individual. The court reporter was unable contemporaneously to transcribe the relevant portion of DOE Exhibit 9 because the polygraph examiner spoke very rapidly. The individual, the DOE Counsel, and I agreed to furnish the videotape to the court reporter after the hearing so that she could have extra time to transcribe that portion, and it is included in pages 17-24 of the hearing transcript.

In the post-test interview, the individual and the polygraph examiner discussed the results of the polygraph examination. The individual told the polygraph examiner, “I don’t think that one went very well. Every time you mentioned the word masturbate I could feel the response.” *Tr.* at 17. The individual added, “I’m not trying to deceive you, but obviously the machine is picking up that, you know, maybe I’m trying to deceive myself.” *Id.* at 18. When further pressed by the polygraph examiner, the individual stated, “Well, I guess I’ve been lying to myself about it for a long time then because, you know, it was something that really scared me.” *Id.* at 20. Finally, the individual admitted to the polygraph examiner that he was stroking himself in the restroom on that day. *Id.* at 22.

At the end of the videotape, the analyst resumed her testimony. She explained that when she received the polygraph report, DOE Exhibit 4, it “was not matching up with what [the individual] had told me in my first interview.” *Id.* at 25. The relevant portion of the report referred to the post-test interview, in which the individual admitted that he had deliberately exposed himself to the police officer. The analyst called the individual in for a second PSI to address the discrepancies. Characterizing the second PSI, the analyst testified she “came to the conclusion that [the individual] had actually admitted that he had in fact masturbated in front of that police officer, and that he had not been completely honest and truthful with me in the previous personnel security interview about that incident.” *Id.* at 26; July 2002 PSI Transcript (hereinafter cited as “DOE Exhibit 2”) at 15.

The analyst pointed out other significant discrepancies between the individual’s statements in the first and second PSIs. In the second PSI, the individual told the analyst that he had actually been involved in between 50 and 100 homosexual encounters from the age of 18 to the present, including “around four” encounters in the four years since the individual had moved to his present location. *Tr.* at 26; DOE Exhibit 2 at 27-29. During the first PSI, he told the analyst he had fewer than ten homosexual encounters, and the individual tried to excuse this discrepancy by explaining that he thought they were only discussing encounters that he had told his wife about. DOE Exhibit 2 at 32.

The individual conceded that he had limited his answers to the analyst's questions during the first PSI, and "I was not being as forthcoming as I should have been." *Id.*

In the second PSI, the individual also admitted that he had still not told his wife about the full extent of his homosexual activities, specifically, that he had not told her anything about the four most recent encounters he had during the last four years. According to the individual, however, his wife knew he was sexually molested as a child, and that he has had sex with men on occasion. The individual told the analyst that his wife does not like it but he does his best to stay faithful, and she "understands that is something that I struggle with." DOE Exhibit 2 at 26. The analyst again asked the individual, as she had in the first PSI, if he was homosexual. The individual replied that, "I do not see myself as a homosexual," and explained that his definition of homosexual is someone who "by preference" prefers to have sex with members of their own sex. *Id.* at 30. Instead, the individual said that he would call himself a "bisexual," meaning "someone who can enjoy sex with members of their own sex." *Id.* at 31. The individual said his wife would be "disappointed," "upset," and "it would make her unhappy" to know that he had been involved in recent homosexual encounters. *Id.* When the analyst asked the individual during the second PSI about his future conduct, he answered that he hoped he would not have more homosexual encounters because he did not want to expose his wife to more pain. However, he stated, "I can't rule them out completely," and "Unfortunately, opportunity presents itself, temptation is there, and...." *Id.* at 45.

At the conclusion of her testimony, I asked the analyst whether DOE cared if somebody is a homosexual. She answered, "No. Homosexuality in and of itself would not be considered a security concern." *Id.* at 49. She said it would be the same if a person were bisexual. She added that, "Those are both behaviors that the Department of Energy would be interested in, but would want to know more about. But would somebody be denied a clearance because they're homosexual or bisexual? No, that would not be the case." *Id.* The analyst explained that DOE would be concerned about whether an individual's sexual behavior could be used to blackmail him, or whether he engaged in "lifestyle choices" like having sex in restrooms, that could subject him to arrest and thus raise questions regarding his judgment. *Id.* at 51. She indicated DOE would be concerned if any individual, regardless of sexual preference, had extramarital affairs, or was otherwise secretive about his or her sex life, since this conduct could make that individual vulnerable to blackmail or coercion. *Id.* at 50-51. Finally, the analyst pointed out that it could also raise a security concern if an individual deliberately omitted information about his sexual behavior during a PSI if it were a relevant area of inquiry on which DOE had focused, based on something in his background investigation. *Id.* at 53.

The Personnel Security Specialist

The DOE called the personnel security specialist to testify about the nexus between the information about the individual's conduct and the criteria in 10 CFR § 710.8 of the DOE regulations. She explained that the evidence of the individual's omission of significant facts relevant to his eligibility for access authorization during the first PSI raised a security concern under 10 CFR § 710.8(f). The security specialist noted that the

personnel security program is based on trust, and that when an individual is found to have been untruthful, it is difficult for the DOE to trust that person to comply with security regulations in the event they are given access to classified information. *Tr.* at 67. She further explained that the individual's history of engaging in homosexual encounters while married made him vulnerable to blackmail or coercion under 10 CFR § 710.8(l). *Id.* at 69.

On cross-examination by the individual, the security specialist stated that she regarded "full disclosure" and "truthfulness" as essentially the same for purposes of determining his eligibility for access authorization. He asked the security specialist to comment on the language in 10 CFR § 710.8(f) which states that a concern is raised when an individual *deliberately* misrepresented, falsified, or omitted significant information that is relevant to their eligibility for a clearance from an interview. She replied that it was "a deliberate act" when the individual neglected to tell DOE significant information in the first PSI even if he did so because he was ashamed, embarrassed, or was not being honest with himself. *Id.* at 73.

The Individual's Longtime Personal Friend

The friend testified by telephone that he had known the individual for about 20 years. He stated that he knew the individual had been sexually molested as a child, that the individual was sexually active before his marriage, and that the individual had not revealed that information to his wife. *Id.* at 57. The friend knew about the individual's homosexual activities, and that the individual had not been completely faithful to his wife. *Id.* at 59. He also knew about the polygraph examination, and how it led the individual to conclude he must have been masturbating in front of the police officer. *Id.* at 60. The individual's friend believed the individual was "sometimes painfully honest, brutally honest, and someone who would most likely—well, beyond any doubt that I can foresee, uphold whatever security was left in your hands." *Id.* at 61. The individual's friend told an anecdote to illustrate what he meant. When they were college students, he and the individual worked as waiters in a restaurant. According to the friend, it was "standard practice for waiters [including the witness] who were waiting tables to report only part of the tips that they had received on a daily basis." The friend remembers that the individual considered this pervasive practice to be dishonest, illegal, and immoral, and the individual reported "every single dime" that he received in tips. *Id.* at 61-62. The friend thought this showed that the individual has his "own sense of moral compass," and takes "many steps, extraordinary steps in some cases, to make sure that you're in compliance with whatever law or guideline or rule or whatever seems appropriate for the situation." *Id.* at 62.

The Individual's Project Manager

The individual's project manager testified that the individual had told him about being sexually molested as a child, having homosexual experiences, being unfaithful to his wife, being arrested for indecent exposure, and showing "deception" when he answered "no" to polygraph questions about masturbating before his arrest. In addition, the

individual told the manager that “my wife is the only woman that I’ve ever had sex with.” *Id.* at 80. The manager has a security clearance, and directs a “classified project.” According to the manager, while the individual does not deal with classified information, he does deal with “business sensitive information.” The manager stated the individual has shown diligence and care in following procedures established to protect that information. The manager also praised the individual for his willingness to work extra hours whenever needed. *Id.* at 82-83. Finally, the manager explained that the individual did not need a clearance to do his current job, but that he asked the individual to apply for access authorization so he could leverage his expertise by helping on the classified side of the project. When the security concerns surfaced, the manager told the individual he could simply keep his current duties, and did not have to pursue the clearance. The manager thought it spoke highly of the individual that he was willing to go forward with the administrative review process, even though he “had an out.” *Id.* at 84-85. The manager did not believe the individual was subject to blackmail at this point. *Id.* at 87.

The Individual’s Fellow Employee

The individual next called a fellow employee at the DOE facility. This witness does not work with the individual, but they have become social friends. The individual had told his fellow employee the same information about the individual’s sexual history that he revealed to the manager. The fellow employee characterized the individual as very trustworthy. He also related an anecdote about a casual conversation with the individual when the fellow employee was about to mention some sensitive, “maybe even borderline classified,” information about a project he was working on, and the individual stopped him before he inadvertently divulged anything. *Id.* at 91-92. Like the manager before him, the fellow employee praised the individual’s initiative for going through the administrative review process. The fellow employee said that he would not do it himself. The fellow employee speculated that the individual’s past sexual behavior could “potentially” make him vulnerable to blackmail. *Id.* at 93.

The Individual’s Wife

The individual’s wife testified that although she had long known the individual had been molested as a child, and had homosexual experiences before they were married, it was not until recently that he had told her much more information about the nature and extent of his homosexual activities before and during their marriage. She also acknowledged that the individual initially denied he had been masturbating before his arrest, but that he later “accepted the logic of the polygraph,” and admitted that he “must have been doing something.” *Id.* at 97. The individual’s wife stated that they had discussed his marital infidelity, “recognized that it’s not appropriate and will never happen again.” She added that learning about the individual’s infidelity made her very upset, and emphasized that it “Better not happen again.” *Id.* at 98.

When asked whether she thought granting her husband a clearance would not endanger national security and would clearly be in the national interest, the individual’s wife stated that she believed the individual was a perfectionist who was very good at what he did, a

moral person who followed rules “to the letter of the law,” and who could be trusted to protect classified information. She illustrated the basis for her trust in the individual with several anecdotes about conduct that showed his honesty. For example, she said the individual would always refuse a request to make an illegal, unlicensed copy of computer software. She also told about a time when the individual insisted they drive on a bad road up a mountain to return a periodic table she had taken from the trash at a vacation home they had considered buying. *Id.* at 99-105. The individual’s wife acknowledged that very few people knew about his sexual conduct, but stated that she did not believe he could be subject to blackmail. *Id.* at 110.

The Individual

The individual conceded that he could see from reading the transcript of the first PSI he said things that “could have been considered as misleading,” but insisted, “there was no intention to mislead.” *Id.* at 111. The individual maintained he did not admit during the first PSI that he had been masturbating before his arrest because he did not realize he had been deceiving himself until the polygraph examination later led him to that conclusion. He also claims that during the first PSI, he did not admit he was bisexual because it was embarrassing, that he did not reveal his entire sexual history because the interviewer failed ask him the precise questions needed to elicit that information, and he did not know he was expected to disclose it voluntarily. *Id.* at 112; 119-120; 126. He pointed out that he made a full disclosure during the second PSI.

During the hearing, the individual played a second portion of the polygraph videotape discussed above, which he believed was exculpatory. *Tr.* at 17-24; DOE Exhibit 9. The portion of the videotape the individual asked me to consider is reproduced in the hearing transcript at 114-115. It recorded questions from the polygraph examiner and the individual’s answers:

POLYGRAPH EXAMINER: Regarding whether you masturbated in the restroom, do you intend to answer truthfully about that?

INDIVIDUAL: Yes.

* * *

POLYGRAPH EXAMINER: Other than what you told me, before your 30th birthday did you ever deliberately lie to cover something up?

INDIVIDUAL: No.

Tr. at 114. The individual emphasized that the polygraph report, DOE Exhibit 4, did not find the individual was deceptive when he answered “yes,” that he *intended* to answer truthfully about whether he masturbated in the restroom, and “no,” that he did not ever *deliberately* lie to cover something up. *Tr.* at 115. According to the individual, these portions of the polygraph examination corroborate his claim that he did not *deliberately* misrepresent, falsify or omit significant information from DOE: “That’s the only firm,

hard evidence I can provide that says there was no intention to mislead or deceive anyone in this entire process, other than my own word.” *Id.* at 116-117.

The individual maintained that the evidence about his honesty, his ethical behavior, and the depth of his voluntary disclosures about his sexual conduct to his wife, friends, and business associates shows that he has taken positive steps to reduce his vulnerability to coercion or blackmail. *Id.* at 140. He stated that he would resist any blackmail attempt.

Analysis

Conduct involving untrustworthiness or lack of candor could indicate that a person may not properly safeguard classified information. This includes deliberately providing misleading information to a security representative in connection with a determination of eligibility for a clearance. Personal conduct or concealment of information that may increase an individual’s vulnerability to coercion, such as engaging in sexual behavior, which, if known, may render the person susceptible to blackmail, also raises security concerns. *See* Appendix B to Subpart A of 10 CFR Part 710, 66 Fed. Reg. 47067 (2001), Guidelines D and E.

The individual does not deny that he omitted significant information from the first PSI that was relevant to his eligibility for access authorization. Nor does he deny that his history of secretive sexual encounters with men while he was married could raise questions about his vulnerability to coercion or blackmail. Accordingly, I find there is a proper basis for the charges in the Notification Letter. As explained below, I have concluded that the individual has failed to mitigate either the security concerns under Criterion F about his failure to disclose significant information about his sexual conduct during the first PSI when DOE’s interest had clearly focused on this topic, or the security concerns under Criterion L about his vulnerability to coercion or blackmail.

The individual’s defense to the charges under Criterion F is based on semantics, and a narrow interpretation of the regulatory language. His argument is similar to a “diminished capacity” defense in a criminal proceeding, that the individual lacked the intent to hide information during the first PSI. The individual asserts that he did not *deliberately* misrepresent, falsify, or omit significant information from the first PSI, but rather did so without intent to deceive DOE, as a result of self-deception, embarrassment, or misunderstanding what the interviewer was asking him to reveal. The polygraph report tends to support the individual’s claim that he did not intend to mischaracterize the circumstances of his arrest. However, embarrassment or self-deception is not a good reason for misleading DOE in the first PSI when the individual failed to reveal that he considers himself bisexual. Nor do I find credible the individual’s claim that he did not understand what information the analyst was trying to elicit during the first PSI when she asked him if there was anything else he thought DOE should know. I find the individual acted deliberately when he denied having had a prior encounter in the same restroom, and failed to reveal that he had many more than ten homosexual encounters, some of which were during the past four years. The individual is an educated, intelligent person, and he must have understood what kind of information the analyst wanted him to reveal since

the first PSI had focused up to that point on his sexual behavior and history. The individual even admitted in the second PSI that he was not as forthcoming as he should have been during the first PSI. Taken as a whole, the individual's attempt to justify his omission of significant information from the first PSI is not persuasive.

There is much evidence that the individual is an honest, upstanding, and moral person in most areas of his life. Nevertheless, he had an apparent blind spot about his sexual behavior that made it difficult for him to recognize the truth and accept the consequences. That is the conclusion I draw from the individual's attempt to justify his self-deception about the indecent exposure arrest, and his embarrassment about revealing the scope of his homosexual history and marital infidelity. Those do not excuse concealing information from DOE. The individual may have "come clean" in the second PSI, but not enough time has gone by since the individual's admissions to know whether he can be trusted in the future. *Compare Personnel Security Hearing* (Case No. VSO-0013), 25 DOE ¶82, 752 (1995) (13-month period subsequent to covering up use of illegal drugs did not constitute a sufficient pattern of honest behavior) *with Personnel Security Hearing* (Case No. VSO-0410), 28 DOE ¶ 82,786 (2001), *affirmed* (OSA March 21, 2001) (eight years of honest behavior was sufficient evidence that the individual had reformed). The fact that the individual engaged in self-deception about his arrest may partially mitigate one of the concerns under Criterion F, but it has troubling implications when considered in connection with DOE's concerns under Criterion L, addressed below.

Regarding Criterion L, it should be emphasized that sexual orientation or preference may not be used as a disqualifying factor in determining eligibility for a security clearance. However, as the analyst noted at the hearing, the individual's history of secretive extramarital homosexual behavior is a matter of continuing concern because it could cause him to be vulnerable to coercion or blackmail. The individual has reduced the concern that he would be subject to coercion about his past behavior by disclosing that information to several persons close to him. But for the future, the stakes are still high. The individual's wife was upset by his revelations of extramarital encounters in recent years, and she said it better not happen again. The individual's marriage and family life would be in jeopardy if, in the future, his wife were to learn he had another encounter. Although the individual has proclaimed his desire to remain married, and his intention never to have another encounter, I must weigh that against his history of 50 to 100 encounters, including several within the past four years, his admission in the second PSI that it could happen again, and his characterization of himself as bisexual, which he defined as one who can enjoy having sex with members of his own sex. Despite his good intentions, it is uncertain whether the individual will be able to refrain from having sex with men in the future. My conclusion above, that the individual had a blind spot about his sexual behavior and difficulty accepting its consequences, is also relevant to assessing the risk. On balance, I find that the circumstances in this individual's case present a considerably greater-than-average risk that he may engage in behavior that would make him vulnerable to coercion in the future. In my opinion, that risk is too great to warrant granting the individual a clearance.

Conclusion

Based on the record in this proceeding, I find that the individual has failed to resolve the security concerns presented under 10 CFR §§ 710.8(f) and (l). For the reasons explained in this Decision, I find the individual has failed to show that granting him access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. Accordingly, it is my decision that the individual should not be granted access authorization. The individual may seek review of this Decision by an Appeal Panel under the regulation set forth at 10 CFR § 710.28.

Thomas O. Mann
Hearing Officer
Office of Hearings and Appeals

Date: September 5, 2003